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Nos. 93-1876 and 93-8822

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In the Supreme Court of the United States

OCTOBER TERM, 1994

STEVEN LUONG, PETITIONER

v.

UNITED STATES OF AMERICA

DAI QUOC LU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner Luong's conviction for engaging in extortion affecting interstate commerce, in violation of the Hobbs Act, 18 U.S.C. 1951, is invalid because the victims of the extortion were engaged in illegal businesses.

2. Whether the government engaged in impermissible selective prosecution of petitioner Luong.

3. Whether petitioner Lu was denied his Sixth Amendment right to counsel through representation by his retained attorney who he knew was the target of a criminal investigation on matters unrelated to the charges against Lu.

4. Whether petitioner Lu was denied his right to a fair trial by admission of certain evidence and the trial court's failure to grant him a severance.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1876

STEVEN LUONG, PETITIONER

v.

UNITED STATES OF AMERICA

No. 93-8822

DAI QUOC LU, PETITIONER

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals in petitioner Steven Luong's case (93-1876 Pet. App. A1-A3) is unpublished, but the judgment is noted at 19 F.3d 645 (Table). The opinion of the court of appeals in petitioner Dai Quoc Lu's case (93-8822 Pet. App. A1-A10) is unreported. The opinion of the district court denying petitioner Lu's motion for a new trial (App., *infra,* 1a-8a) is unreported.

JURISDICTION

The judgment of the court of appeals in No. 93-1876 was entered on February 23, 1994, and the petition for a writ of certiorari was filed on May 20, 1994. The judgment of the court of appeals in No. 93-8822 was entered on March 23, 1994, and the petition for a writ of certiorari was filed on April 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners and two of their co-defendants (Tien Tuan Ngu and William Ho) were convicted on one count of conspiracy to commit extortion and two counts of extortion in violation of the Hobbs Act, 18 U.S.C. 1951. Petitioner Luong was sentenced to 120 months' imprisonment, to be followed by three years' supervised release. Petitioner Lu was sentenced to 200 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed Luong's conviction and sentence. 93-1876 Pet. App. A1-A3. In a separate order, the court of appeals affirmed Lu's conviction, but remanded Lu's case for further sentencing proceedings. 93-8822 Pet. App. A1-A10.

1. Petitioners were members of a gang that extorted "protection money" from two proprietors of brothels in the Chinatown area of Philadelphia, Pennsylvania. They induced the proprietors to pay money and other things of value through threats, force, and violence.

In October 1987, co-defendant Ngu demanded that Ok Sim Kim, the proprietor of the Dynasty Massage Parlor, pay $600 per week in return for having Ngu's "soldiers" watch the massage parlor. After Ngu returned with other men to renew the demand, Kim agreed to pay $500 per

week because she feared the gang members would hurt her if she did not pay. Ngu introduced petitioner Lu to Kim as his partner. Kim paid extortion money from 1987 through the beginning of 1990, and Lu or Luong sometimes collected the extortion payments. When Kim asked Ngu that gang members not bring guns into her business, Ngu assaulted her. Gov't C.A. Br. 14-19.

In 1987, petitioner Lu and Ngu told Oe Pok Spencer, the manager of the Red Dragon Massage Parlor, that they would close down her business if she did not pay them protection money. Lu brandished a gun when he made the threats. Gov't C.A. Br. 5. After Spencer initially refused, Lu and Ngu harassed and frightened Spencer, her employees, and customers for about three months. *Ibid.*; 93-8822 Pet. App. A3-A4. Because Spencer became afraid that she or her employees would be hurt if she did not pay, she began making weekly payments of $450 to $700 to Lu and Ngu. From 1987 through 1990, Lu and Ngu often sent petitioner Luong to collect the payments. Gov't C.A. Br. 5-6.

After Spencer began to make the extortion payments, Lu, Ngu, and Luong demanded additional money from Spencer's customers and employees. Spencer often asked petitioners and their fellow gang members to stay away from the Red Dragon because they frightened her, her employees, and her patrons, but they continued to appear there. On one occasion, Luong frightened several customers by displaying a gun. When Spencer became frightened and asked Luong to leave, he refused and kicked the walls and door before he left. After he was outside, Luong fired several shots into the air as a warning to Spencer. Gov't C.A. Br. 6-7.

In November 1989, petitioner Luong and Ho tried to extort money from the owner of the Lilly Chau restaurant in South Philadelphia. They were convicted of that offense

in state court. At the time of the arrests, Lu and Ngu demanded that Spencer and Kim provide money for bail for Luong, Ho, and another gang member. Gov't C.A. Br. 8, 19.

In May 1990, Spencer purchased part ownership of a massage parlor called Physical Therapy. From 1990 until their arrest in 1991, petitioner Lu and Ngu collected extortion payments of $600 per week from Spencer there. Gov't C.A. Br. 13. At one point, Spencer told Ngu that she could not continue to make the payments. Ngu replied, "Watch what happen. Watch what happen," and he warned that Spencer would have "a lot of headache" if the payments stopped. *Id.* at 13-14.

In addition to the cash extortion payments, Lu and Ngu forced Spencer and Kim to pay thousands of dollars for long distance telephone calls made by gang members on their telephones. Gov't C.A. Br. 14, 18.

2. Petitioner Lu retained attorney Robert Simone to represent him in district court. When Lu retained Simone, Simone was the target of a criminal investigation by the same United States Attorney's Office that was prosecuting petitioners. 93-8822 Pet. App. A14. Simone informed Lu of that fact when Lu retained him. *Id.* at A51.

The government notified the court of the potential conflict of interest that Simone had because he was under investigation and was represented by Ngu's attorney in that investigation. 93-8822 Pet. App. A30. The government requested that the court conduct a colloquy to address the matter. At a hearing on February 14, 1992, the court informed Lu that Simone's target status could create problems in his legal representation of Lu. The court told Lu that it might "look pretty bad" to the jury if the investigation of Simone became public (93-8822 Pet. App. A46), that Simone's "interest might be to protect himself when

he is dealing with the prosecutors instead of looking out for [Lu's] interest" (*ibid.*), that Simone "might be very busy handling his own case and he might not spend as much time on [Lu's] case as he would like to" (*id.* at A47), and that Simone "might not be available to help [Lu] when [Lu] need[ed] him at the trial * * * [s]o that another lawyer would have to be appointed" (*ibid.*). Lu stated that he understood. *Id.* at A46-A49.

The district court suggested to Lu that he replace Simone with another lawyer. 93-8822 Pet. App. A49-A50. The court also informed Lu that if he wanted another lawyer to represent him and could not afford another lawyer, "the Government [would] appoint one for [him] free of charge." *Id.* at A45. Lu stated that he understood the potential problems created by Simone's representation, but that he still wished Simone to continue representing him. *Id.* at A45, A50. The court found that Lu had "voluntarily waived any perceived or real conflict of interest in the representation of Mr. Lu by Mr. Simone." *Id.* at A63.

Before trial, the government unsealed two indictments against Simone. In light of that development, the district court again addressed Lu about the potential conflict of interest. The court ensured that Lu knew of the unsealing of the indictments, again warned Lu of the possible consequences of Simone's continued representation of him, and advised Lu that he should have a different lawyer. 93-8822 Pet. App. A68-A69. Lu repeated that he understood, but he still wanted Simone to represent him. *Id.* at A68-A71. The court found that Lu had voluntarily and knowingly waived his right to conflict-free counsel, and it authorized his continued representation by Simone. *Id.* at A72.

3. At trial, Lu sought to exclude testimony about the attempted extortion at the Lilly Chau restaurant by co-

defendant Ho and Luong. App., *infra,* 3a-6a. Lu argued that the testimony was inadmissible other crimes evidence and that, if it were not excluded, the trial court should sever his and co-defendant Ngu's trial from that of Ho and Luong. The district court concluded that the evidence was relevant and not prejudicial. *Id.* at 4a. The evidence was admitted "solely to demonstrate that defendants Ho and Luong had the intent, knowledge, [and] ability to carry out an extortion, and [their] modus operandi." *Ibid.* Before allowing testimony about the incident, the court gave the jury a cautionary instruction explaining the limited purpose of the evidence and against whom it was offered. *Ibid.* Again, in its final charge to the jury, the court explained the limited purpose for which the evidence could be considered and specified that the evidence could not be considered for any reason against any defendant other than Ho and Luong. *Id.* at 4a-5a.

The witness to the attempted extortion at the Lilly Chau restaurant also testified that he had previously been threatened before testifying. App., *infra,* 6a-7a. Petitioners objected and moved for a mistrial. After conducting a sidebar conference, the court gave a curative instruction to the jury stating that the only threats in the case occurred at the Lilly Chau restaurant in November 1989, and that the jurors should disregard comments by counsel at the close of the witness's testimony. *Id.* at 7a.

During the trial, various witnesses referred to petitioners and their co-defendants as "gangsters" or "gang members." Kim, one of the extortion victims, testified on redirect examination about co-defendant Ngu assaulting her. 93-8822 Pet. App. A4-A5; Gov't C.A. Br. 50. The testimony was elicited to rebut Ngu's attempt to depict himself as subservient to the extortion victims. In addi-

tion, Kim responded to a question regarding arguments she had had with Ngu by mentioning that she had asked him not to bring guns or drugs into her business. Gov't C.A. Br. 50-51. Ngu himself then elicited testimony from Kim, without objection from petitioners or the other co-defendants, that although she argued with Ngu about drugs, Kim had not seen the drugs herself. *Id.* at 51. Shortly after that testimony, the district court instructed the jury as follows:

> I want to ensure [*sic*] you in no uncertain terms that there is no allegation by the Government in this case that these defendants were involved in drugs in any way including use. You are not [to] consider Ms. Kim's statement as evidence of any such activity. You may consider that statement in context only with respect to the issue involving guns, and whether [defendant's] relationship with Ms. Kim was polite or antagonistic. That's the only purpose of that, it's just not in this case, the concept of drugs.

Ibid.

Petitioners and their co-defendants were convicted on one count of conspiracy to commit extortion and two counts of extortion. The district court denied a motion for new trial filed by Lu and Ngu. The court reaffirmed its conclusion that the evidence of the Lilly Chau extortion attempt was admissible for limited purposes against Luong and Ho. In addition, it concluded that "any potential prejudice to Lu and Ngu, which I find was insignificant, was eviscerated by [the jury] instructions," and that their substantial rights were not affected. App., *infra*, 5a. The court also rejected the argument that it erred by denying a mistrial when the owner of the Lilly Chau restaurant testified about having been threatened. It concluded that its "[jury] instruction cured any prejudice which may have resulted during the testimony at issue." *Id.* at 7a.

4. On appeal, petitioners claimed, *inter alia,* that the district court lacked jurisdiction to try them under the Hobbs Act because an illegal prostitution business does not constitute "commerce" within the meaning of 18 U.S.C. 1951(b)(3). The court of appeals summarily rejected the claim. 93-1876 Pet. App. A1-A3; 93-8822 Pet. App. A2 n.1.

Petitioner Lu also claimed, *inter alia,* that he was denied effective assistance of counsel because of his attorney's alleged conflict of interest and that he was denied a fair trial due to the admission of the evidence of the Lilly Chau extortion and by the denial, in the alternative, of a severance. Lu also claimed that he was denied a fair trial because: the terms "gangs" and "organized crime" were used during trial; Kim testified about Ngu's assault of her and referred to his possession of illegal drugs; and the Lilly Chau owner testified about being threatened by Luong and Ho. 93-8822 Pet. 4-5. The court of appeals summarily rejected those claims. 93-8822 Pet. App. A2 n.1, A10.[1]

Petitioner Lu challenged his sentence on several grounds, including the district court's two-level upward adjustment of his offense level under Sentencing Guidelines § 2B3.2(b)(3) (Nov. 1, 1990), because "there was significant bodily injury to the victims and their customers." 93-8822 Pet. App. A2. The court of appeals agreed with Lu that the facts on which the government had relied for that enhancement did not support it. The court of ap-

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[1] In listing the claims of trial errors raised by petitioner Lu and the two co-defendants in their consolidated appeal, the court of appeals did not identify Lu's argument that Simone had a conflict of interest. See 93-8822 Pet. App. A2 n.1. At the conclusion of its opinion, however, the court of appeals specified that except for one challenge to the two-level enhancement to the sentences of Lu, Ngu and Ho, it "affirm[ed] as to all other issues raised on appeal." *Id.* at A10.

peals remanded Lu's case for further proceedings in regard to sentencing. 93-8822 Pet. App. A10.

ARGUMENT

1. Petitioner Luong renews (93-1876 Pet. 8-21) his contention that the illegal prostitution businesses from which he extorted money do not qualify as "commerce" within the meaning of the Hobbs Act (Act), because "commerce" as used in the statute does not include commerce that is illegal under federal law. He asserts that applying the Hobbs Act to prostitution would be contrary to the purposes of the Mann Act, 18 U.S.C. 2421-2424, which prohibits interstate transportation of persons for prostitution or certain other immoral purposes. He also claims that the decision below conflicts with *United States* v. *Enmons*, 410 U.S. 396 (1973).[2]

The Hobbs Act makes it a federal crime to obstruct, delay, or affect, "in any way or degree," commerce "or the movement of any article or commodity in commerce, by * * * extortion." 18 U.S.C. 1951(a). The Act defines "commerce" to include "all commerce between any point in a State * * * and any point outside thereof; * * * and all other commerce over which the United States has jurisdiction." 18 U.S.C. 1951(b)(3). The victims of the extortion in this case—managers of Philadelphia massage parlor businesses—were directly involved in commerce because employees, customers, and supplies used in their estab-

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[2] Petitioner Lu does not include that jurisdictional claim in his petition or in his questions presented. At the close of his petition, however, Lu purports to "incorporate by reference * * * any arguments propounded by any * * * co-appellants who may file a Petition for Writ of Certiorari." 93-8822 Pet. 10. We do not believe that Lu has properly presented the issue for review in his case, but, in any event, the issue does not merit this Court's review.

lishments crossed state lines, and thus fell within the ambit of the statute.[3]

Numerous courts have recognized that illegal businesses may constitute "commerce" within the meaning of the Hobbs Act. See, *e.g.*, *United States* v. *Esposito,* 771 F.2d 283, 286 (7th Cir. 1985) (Hobbs Act applies not only to mixed legal-illegal business, but also where the victim's business is "totally illegal");[4] *United States* v. *Ambrose,* 740 F.2d 505, 511-512 (7th Cir. 1984) (Hobbs Act applies to illegal drug business where extortion promotes illegal commerce); *United States* v. *Hanigan,* 681 F.2d 1127, 1130-1131 (9th Cir. 1982) (Hobbs Act is not limited to "legal" commerce; illegal movement of undocumented aliens into this country constitutes commerce for purposes of Hobbs Act jurisdiction), cert. denied, 459 U.S. 1203 (1983).

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[3] Some legal interstate commerce also was involved in this case, although it was incidental to the unlawful activity. The managers testified that food (purchased in interstate commerce) was provided to employees. Cf. *United States* v. *Ambrose,* 740 F.2d 505, 511 (7th Cir. 1984) ("Some legal interstate commerce was affected by the defendants' extorting money from the drug dealers whom they protected—commerce in the quinine and other substances that are mixed with heroin and cocaine in preparing them for sale to the consumer." (emphasis omitted)).

[4] Petitioner claims (93-1876 Pet. 14-15) that in *United States* v. *Blakey,* 607 F.2d 779, 783 & n.7 (7th Cir. 1979), the court "implicitly recognize[d] that pure illegality untainted by legitimate business does not constitute commerce and does not supply jurisdiction" for a Hobbs Act prosecution. The *Blakey* court did not, however, imply such a rule but rather expressly left open the question because it found that the heroin business at issue in that case had "a legitimate facet," albeit small (less than one percent of the extortion victim's business was legitimate; 99% of his gross income came from a heroin and fencing operation), and that fact supported jurisdiction. 607 F.2d at 783. Moreover, in *Esposito,* subsequent to *Blakey,* the Seventh Circuit expressly stated that even an entirely illegal business would satisfy the jurisdictional requirement of the Hobbs Act. 771 F.2d at 286.

Nothing in the statute or its legislative history supports petitioner's claim that "commerce" must be legal in nature in order to fall within the Hobbs Act. The statutory text does not limit "commerce" to the flow of legally condoned articles or services. Nor does the Commerce Clause of the Constitution require an activity to be legal in order to be regulated by Congress. See *United States* v. *Hanigan,* 681 F.2d at 1131 ("commerce" includes movement of illegal alien laborers).[5]

Under the Hobbs Act, only a *de minimis* effect on commerce is required. See *United States* v. *Staszcuk,* 517 F.2d 53, 56-60 (7th Cir.) (en banc), cert. denied, 423 U.S. 837 (1975). Congress intended that the Hobbs Act employ the commerce power to the fullest extent possible. *Ibid.* In *Stirone* v. *United States,* 361 U.S. 212, 215 (1960), this Court expressly noted the wide reach of the statute:

> [The Hobbs] Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence.

See also *United States* v. *Culbert,* 435 U.S. 371, 373 (1978) (the statutory language does not "lend [itself] to restrictive interpretation"). In light of the settled reach of the Hobbs Act, petitioner errs (93-1876 Pet. 19-20) in arguing for the application of the rule of lenity in this case.

The decision below does not conflict with *United States* v. *Enmons,* 410 U.S. 396 (1973), as petitioner claims

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[5] Petitioner relies (93-1876 Pet. 15-16) on *United States* v. *Yokley,* 542 F.2d 300, 304-305 (1976), where the Sixth Circuit affirmed the dismissal of a Hobbs Act indictment for robbery of a K-Mart store, because the court deemed the Hobbs Act to reach only racketeering activity. But this Court rejected that interpretation in *United States* v. *Culbert,* 435 U.S. 371, 372 (1978), where it held that the Hobbs Act is not limited to "racketeering," but applies to "all conduct within the reach of the statutory language." *Id.* at 380.

(93-1876 Pet. 19-20). *Enmons* involved violent conduct during a lawful labor strike aimed at obtaining employer agreement to legitimate union objectives. The Court held that "the [Hobbs] Act does not apply to the use of force to achieve legitimate labor ends." 410 U.S. at 401. Nothing in *Enmons* limits the application of the Hobbs Act to commerce that is legal in nature.

2. Petitioner Luong also argues (93-1876 Pet. 21-26) that the government engaged in improper selective prosecution of him. He claims that the prostitution businesses from which he extorted money affected interstate commerce on a larger scale than did his activities, and that the government's decision to prosecute him and his co-defendants instead of the prostitution proprietors is a "puzzling anomaly," and "troublesome." 93-1876 Pet. 25.

A prosecutor has broad and largely unrestricted discretion about whether to prosecute and what charges to bring. That is true even when two statutes reach the same conduct and one offense carries greater penalties than the other. *United States* v. *Batchelder,* 442 U.S. 114, 123-126 (1979); *Bordenkircher* v. *Hayes,* 434 U.S. 357, 364 (1978); *United States* v. *Nixon,* 418 U.S. 683, 694 (1974). Unless petitioner can show that the prosecution was "motivated by a discriminatory purpose" and had a "discriminatory effect" on him, he cannot succeed on his claim. *Wayte* v. *United States,* 470 U.S. 598, 608 (1985).

Petitioner has failed to allege or to show that his prosecution was based on an impermissible ground such as race, religion, or the exercise of a constitutional right. See *Wayte,* 470 U.S. at 608, 610. Petitioner attempts (93-1876 Pet. 26) to rely on *United States* v. *Redondo-Lemos,* 955 F.2d 1296 (9th Cir. 1992), but the court's remand in that case was for further consideration of the defendant's claim that the government engaged in gender discrimination in its decisions regarding charging and plea negotiations. The

court expressly distinguished such an equal protection claim from the defendant's claim that the prosecutor exercised discretion in an arbitrary and capricious manner. *Id.* at 1300-1301. Petitioner's claim here is similar to the latter claim, rather than the equal protection claim. The fact that the brothel proprietors cooperated with the government pursuant to plea bargains (93-1876 Pet. 25), leading to the prosecution of petitioners for extortion, does not show that the government had a discriminatory purpose in prosecuting petitioners, or that the prosecution had an impermissible discriminatory effect on them.

3. Petitioner Lu contends (93-8822 Pet. 7-8) that the court of appeals' rejection of his Sixth Amendment ineffective assistance of counsel claim conflicts with the decision of the Second Circuit in *United States* v. *Fulton,* 5 F.3d 605 (1993). Petitioner asserts that under *Fulton,* his attorney's potential involvement in a criminal matter would be deemed a per se conflict of interest, that continued representation by that attorney would violate the Sixth Amendment regardless of any showing of prejudice, and that such a conflict cannot be waived because of the federal court's independent interest in the integrity of its proceedings. Petitioner contrasts the *Fulton* analysis with the Third Circuit's reasoning in *United States* v. *DeFalco,* 644 F.2d 132 (1979), in which the court held that a conflict of interest due to an attorney's own criminal prosecution is waivable. Lu also claims (93-8822 Pet. 8) that any waiver of counsel was defective because he was not advised of his right to court-appointed counsel and because the court did not inquire into his financial status.

a. In *Fulton,* a government witness implicated Fulton's attorney in criminal conduct related to the very charges against which the attorney was defending Fulton. 5 F.3d at 607. The court of appeals held that "[w]hen a government witness alleges that the defendant's counsel

whether to accept a guilty plea." *Mannhalt* v. *Reed,* 847 F.2d 576, 581 (9th Cir. 1988). Nor is this a case in which defense counsel sought to engage in plea negotiations in his own behalf, so that he had an interest in exploiting his representation of his client to curry favor with the government. See 93-8822 Pet. App. A51. In short, there is no basis in the record for concluding that Lu and Simone had divergent interests "with respect to a[ny] material factual or legal issue or to a course of action." *United States* v. *Pungitore,* 910 F.2d 1084, 1141 (3d Cir. 1990) (quoting *United States* v. *Gambino,* 864 F.2d 1064, 1070 (3d Cir. 1988), cert. denied, 492 U.S. 906 (1989)), cert. denied, 500 U.S. 915 (1991).

4. Petitioner Lu asserts (93-8822 Pet. 9-10) that he was denied a fair trial and due process because the district court permitted the introduction of "such a substantial amount of inadmissible evidence so as to impede the fact finding functions of the jury." In support of his claim, Lu argues that the trial court erred in admitting evidence of the Lilly Chau restaurant extortion by Ho and Luong and by not granting a severance as an alternative. He also claims that he was denied a fair trial because of the repeated references to the defendants as "gangsters" or "gang members," the testimony about Ngu's assault on Kim, Kim's reference to Ngu's possession of drugs, and the testimony about the threats by co-defendants against the victim of the Lilly Chau incident.

a. The trial court properly admitted the evidence of the Lilly Chau restaurant extortion for the limited purposes of demonstrating that co-defendants Ho and Luong had the intent, knowledge, and ability to carry out an extortion, and their modus operandi. The defendants had made intent and motive central issues at trial by asserting as a defense that they had been hired by the massage parlor managers as security guards, had been paid as such,

and had never threatened the managers in order to obtain money. Gov't C.A. Br. 55.

The court twice instructed the jury about the limited purposes for which the evidence was admitted and that it was offered only against Ho and Luong. App., *infra,* 3a-5a. Through its instructions, both immediately before the testimony and again at the end of trial, the court instructed the jury that it could not consider the evidence against petitioner Lu. *Ibid.* The trial court did not abuse its discretion in dealing with any possible prejudice to the co-defendants in that manner and did not abuse its discretion in not granting a severance. See *Zafiro v. United States,* 113 S. Ct. 933, 938-939 (1993) (determination of risk of prejudice and any necessary remedy is left to sound discretion of district courts; limiting instructions often will suffice to cure risk of prejudice).

b. The trial court properly permitted introduction of evidence that petitioners and their co-defendants operated as a gang. In an extortion case, the victim's state of mind is a key factual issue because the prosecution must prove that the victims' fear was reasonable and that the defendants instilled such fear or intentionally exploited pre-existing fear. *United States* v. *Goodoak,* 836 F.2d 708, 712 (1st Cir. 1988); *United States* v. *Covino,* 837 F.2d 65, 67-68 (2d Cir. 1988).

The extortion victims testified that petitioners and their co-defendants appeared to be members of a gang and that that was part of the reason why they feared them. Gov't C.A. Br. 38-39. For example, petitioner Lu warned Spencer that his "young boys" would rob her if she did not make her weekly extortion payments. *Id.* at 38. That evidence was directly relevant to proving that defendants instilled fear in the victims. Kim and Spencer testified that part of the reason that they feared petitioners was because they appeared to be a gang through their behavior, dress,

and appearance. Gov't C.A. Br. 38. Given petitioners' exploitation of their gang associations to instill fear in their victims, the district court did not abuse its discretion in admitting the evidence. See *Goodoak*, 836 F.2d at 711.[8]

c. Evidence of co-defendant Ngu's assault on Kim was admissible to prove Kim's reasonable fear of the defendants. Evidence of physical violence against an extortion victim is highly probative of such fear. The evidence was also admissible to rebut the defendants' assertion that, rather than extortionists, they were merely "polite" employees of the victim. Gov't C.A. Br. 50.

The evidence of drug possession was elicited primarily through cross-examination by co-defendants' counsel. In the one instance where the testimony was given during the government's questioning, the response was unsolicited and the court gave a limiting instruction. Gov't C.A. Br. 51. Similarly, when the witness testified about the Lilly Chau restaurant extortion and mentioned that Lu's co-defendants had threatened him, the court immediately gave a limiting instruction to the jury. App., *infra*, 6a-7a. In these circumstances, any error in the admission of the reference to drugs or the threat was harmless.

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[8] Much of the testimony about gang membership was elicited during cross-examination and was admitted without objection. Gov't C.A. Br. 39.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

LOUIS M. FISCHER
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Attorneys

JULY 1994

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 91-119-01-02

UNITED STATES OF AMERICA

v.

DAI QUOC LU AND TIEN TUAN NGU

[Filed July 22, 1992]

MEMORANDUM

Before me is the joint motion of defendants Dai Quoc Lu and Tien Tuan Ngu for a new trial pursuant to Fed. R. Crim. P. 33 (Document No. 80). For the reasons outlined below, the motion shall be denied.[1]

---

[1] Rule 14 of the Local Rules of Criminal Procedure for the Eastern District of Pennsylvania requires motions for a new trial timely filed pursuant to Fed. R. Crim. Pro. 33 [*sic*] "shall be supported by memoranda." Defendants, in the instant case, did not file any memoranda citing factual or legal arguments in support of their short motion. Although I am tempted to dismiss the motion for violating Local Rule 14 I have, nevertheless, carefully and fully considered the substance of the defendants' motion and find it to be without merit.

I. FACTUAL BACKGROUND

Defendants were indicted for conspiracy to commit extortion and the substantive crime of extortion. The superseding indictment charged that defendants Lu and Ngu, along with other defendants, obtained money and other things of value by the consent of the owners and/or managers of certain massage parlors; such consent was induced through defendant's threatened force, violence, and fear. After a three week trial defendants Lu and Ngu, and two other defendants, were convicted on all counts.

Defendants Lu and Ngu now challenge the conviction and seek a new trial based upon several rulings I made during trial that they claim are erroneous.

II. DISCUSSION

A motion for a new trial may be granted "if required in the interest of justice." Fed. R. Crim. P. 33. A court has broad discretion in deciding whether to grant a motion brought pursuant to Rule 33, but should "refuse to grant a new trial if the substantial rights of the defendant were not affected." 3 Wright, Federal Practice and Procedure, § 551 (2d ed. 1982 & Supp. 1992); *United States v. Bevans,* 728 F. Supp. 340, 343 (E.D. Pa.), *aff'm without op,* 914 F.2d 244 (3d Cir. 1990) (Court must grant new trial if "there is a reasonable probability that error infecting the prior proceedings could have had a substantial influence on the jury's decision."), citing, *Government of Virgin Islands v. Bedford,* 671 F.2d 758, 762 (3d Cir. 1982); *United States v. Mastro,* 570 F. Supp. 1388, 1390 (E.D. Pa. 1983). For the reasons which follow, I find that defendants have pointed to no evidence or occurrence which prejudiced the jury against them or affected their substantial rights so as to require a new trial.

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Defendants make six assertions in support of their motion for a new trial. Each will be addressed *seriatim*.

First, defendants assert that the tape recordings of consensual conversations introduced at the time of trial were not properly sealed, and further, that the chain of custody of the tapes was not kept in a lawful manner. Defendants do not provide any factual information in support of this argument. Nevertheless, before trial a hearing was held to determine the admissibility of the recordings based upon the requirements set forth in *United States v. Starks*, 515 F.2d 112, 121 (3d Cir. 1975). At the *Starks* hearing I found that there is no legal requirement that the original tapes be sealed and an access log maintained, and that the government satisfied its burden to establish, *inter alia*, that the tape recordings were properly preserved. *See* Document No. 55: Order dated April 3, 1992. I continue to find that the recordings were properly preserved and therefore conclude that defendants are not entitled to a new trial based upon this claim.

Second, defendants assert that during the course of the trial, I erroneously refused to permit counsel for the defendant Lu to utilize F.B.I. 302 Reports which were statements by F.B.I. agents of interviews with witnesses. Defendants go on to state that such reports contained contradictory matters on serious facts relating to the case. Once again defendants' argument is nonspecific as to which F.B.I. 302 reports they are referring or under what circumstances they were denied access to those reports. After reviewing the trial record, I am satisfied that defendants had ample opportunity to cross-examine each F.B.I. Agent regarding statements made by government witnesses. Consequently, I conclude that this assertion does not raise an issue entitling defendants to a new trial.

Third, defendants assert that I erroneously permitted the introduction of other crimes evidence and erroneously

failed to sever the defendants Lu and Ngu from co-defendants Ho and Luong against whom the other crimes evidence was introduced. The other crimes evidence, that is evidence of an extortion at the Lilly Chau restaurant testified to by government witness Tam Chau, was admitted solely to demonstrate that defendants Ho and Luong had the intent, knowledge, ability to carry out an extortion, and modus operandi. I concluded at trial that the testimony was relevant and not prejudicial. V.R. 4/8/92 at 11:49:15-11:50:15. In addition, prior to Mr. Chau's testimony I gave the jury a cautionary limiting instruction in which I explained the limited nature of the testimony in both its purpose and against whom it was offered. V.R. 4/21/92 16:23:59-16:28:30. I further addressed this issue in my charge to the jury. During my charge I instructed the jury in the following way and in pertinent part:

> The government has offered the testimony of Tam Chau concerning an attempted extortion by defendants Steven Luong and William Ho at the Lilly Chau Club in November 1989, and a stipulation that Luong and Ho were convicted of that offense in the Court of Common Pleas of Philadelphia County, and related offenses, to show that on a different occasion defendants Luong and Ho engaged in conduct similar to the charges in the indictment. This evidence is offered only against defendants Ho and Luong and may not be considered against any other defendant for any reason.
>
> Let me remind you that defendants Luong and Ho are not on trial for committing this extortion attempt, which is not charged in the indictment in this case.
>
> Therefore, you may not consider Mr. Chau's testimony, or the stipulation of the conviction of Luong

and Ho, as a substitute for proof that defendants Luong and Ho committed the alleged extortion of the massage parlors charged in this indictment. Nor may you consider this evidence as proof that defendants Luong and Ho have a criminal personality or bad character. The evidence of the extortion attempt at the Lilly Chau Club was admitted for a much more limited purpose.

If you find that defendants Luong and Ho committed the acts that are charged in the indictment, and that the government has proven by a preponderance of the evidence that the similar acts which formed that basis of the prior conviction in the Court of Common Pleas actually occurred at the Lilly Chau Club, then you may infer, using the evidence of the attempted extortion at the Lilly Chau Club, that in doing the acts charged in this indictment concerning the massage parlors, defendants Luong and Ho acted knowingly and intentionally, and not because of some mistake, accident, or for other innocent reasons. You may also use Mr. Chau's testimony, and the stipulation of the convictions of Luong and Ho, to decide whether defendants Luong and Ho had a mode of operation to carry out an extortion scheme and knowledge of how to carry out an extortion scheme. The testimony of Tam Chau and the stipulation of the convictions of Luong and Ho may not be considered by you for any other purpose.

I am satisfied that my decision to admit other crimes evidence against only two defendants and for such limited purposes was correct. In addition, any potential prejudice to Lu and Ngu, which I find was insignificant, was eviscerated by these instructions. I conclude that substantial rights of the defendants were not affected by the admis-

sion of this testimony and evidence, and defendants are not entited to a new trial on those grounds.

Fourth, defendants assert that they were prejudiced when the prosecuting attorney made references in her closing to other crimes evidence, she stated that Ho and Luong learned from defendant Lu. I inferred at the time that the government was properly arguing from circumstantial evidence. Additionally, the government immediately followed up that statement with a further statement that the evidence was not offered against Lu or Ngu. V.R. 4/28/92 at 12:17:23-12:18:46. Under these circumstances I find that the statement of the government did not amount to any significant prejudice entitling defendants Lu and Ngu to a new trial.

Fifth, defendants assert that I improperly permitted a government witness to interpret the meaning of certain statements made by defendants and contained on tapes and transcripts. The statements were made during an extortionate collection by defendants Lu and Ngu to a victim, Oe Pok Spencer, who was a government witness at trial. Although not stated in their motion, based upon my review of the trial record, I assume that defendants continue to object to the testimony of Spencer on the grounds that the recordings and transcript were in plain broken english and did not require interpretation. I concluded at trial that Spencer's interpretation of what she understood the statements of the defendants to mean was admissible to show Spencer's state of mind which is directly relevant to the elements of extortion. V.R. 4/8/92 at 11:43:07-11:47:22. I therefore conclude that the admission of Spencer's testimony regarding certain portions of the recordings and transcripts was proper and defendants were not substantially prejudiced.

Finally, defendants argue that I erred by refusing to grant a mistrial when Tam Chau testified that he was

threatened prior to taking the witness stand in this case. Defendants argue that although the testimony was against defendants Luong and Ho, it nevertheless prejudiced Lu and Ngu. The threats the witness referred to occurred on November 11, 1989. During the government's redirect examination, the defendants objected and moved for a mistrial based on the following question:

> Q: Mr. Chau, you testified on cross-examination that at the time you testified at another trial against Mr. Ho and Mr. Luong, you had been heavily threatened. Would you translate that first, please.
>
> A: Yes.
>
> Q: Had you, had you in fact received threats at about that time?

V.R. 4/23/92 at 10:45:56. *See also* V.R. 4/22/92 at 12:11:36 (direct examination and testimony); V.R. 4/22/92 at 12:57:15-12:58:32 (cross-examination and testimony).

Defendants objected and moved for a mistrial arguing that the question could be construed to imply that there were other threats made than the ones made in November 1989. After a sidebar conference I gave the jury a curative instruction in which I told them that the only threats in this case occurred at the Lilly Chau restaurant in November 1989 and to disregard the comments by the lawyers at the end of Chau's testimony. *See* V.R. 4/23/92 at 10:49:59. I conclude that my instruction cured any prejudice which may have resulted during the testimony at issue.

III. CONCLUSION

I conclude that the substantial rights of defendants have not been affected in any way by the issues raised in their motion for a new trial and the interests of justice do not require a new trial.

An appropriate Order follows.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 91-119-01-02

UNITED STATES OF AMERICA

v.

DAI QUOC LU AND TIEN TUAN NGU

ORDER

AND NOW, on this 21th day of July, 1992, upon consideration of the joint motion of defendants Dai Quoc Lu and Tien Tuan Ngu for a new trial (Document No. 80), and the response of the government thereto, and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that the motion of defendants is DENIED.

/s/ Lowell A. Reed, Jr.
LOWELL A. REED, JR., J.

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